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## Myanmar's Independent Commission of Enquiry Structural Issues and Flawed Findings

On January 20, 2020 Myanmar's Independent Commission of Enquiry ("ICOE") submitted its final report to Myanmar's government.<sup>1</sup> The report, which was initially due on July 30, 2019, was instead submitted three days before the International Court of Justice ("ICJ") handed down its unanimous decision on provisional measures in *The Gambia v. Myanmar*. With the mandate to "investigate the allegations of human rights violations and related issues, following the terrorist attacks by ARSA,"<sup>2</sup> Myanmar has relied on the work of the ICOE since its creation to object to international efforts, including those of the UN Security Council, to ensure accountability for the crimes against the Rohingya.<sup>3</sup>

The ICOE is not the first, but the eighth *ad-hoc* commission and board set up by Myanmar since 2012 with regard to the situation in Rakhine State; however, the UN Independent International Fact-Finding Mission on Myanmar ("Myanmar FFM") has determined that none of these commissions, including the ICOE, meet the standards of an "impartial, independent, effective and thorough human rights investigation."<sup>4</sup> This Factsheet seeks to provide context and analysis on the ICOE and its final report and can be used by the international community to understand the report and its analysis.

It should be noted that while the final report was submitted to Myanmar's President and State Counsellor,<sup>5</sup> to date, only the Executive Summary and Annexes 16-28 of the report have been released publicly. The Executive Summary and annexes raise serious concerns, and Myanmar must be encouraged to release the full report so that its findings and analysis can be meaningfully evaluated and understood. This is a necessary first step if Myanmar expects the international community to find credence in its claim that the ICOE has "gathered more first-hand information than any other fact-finding body in the world."<sup>6</sup>

### Independence & Impartiality of the ICOE

Principle 7 of the UN principles for the protection and promotion of human rights through action to combat impunity ("UN Impunity Principles") requires that commissions of inquiry have "guarantees of independence, impartiality and competence."<sup>7</sup> The Myanmar FFM has raised serious concerns over the ICOE's independence and impartiality, including statements from the Government and the Commissioners that indicate bias and conflicts of interest.<sup>8</sup> For example, the Myanmar FFM has noted that the ICOE is dependent on Myanmar's government because it "relies on the Office of the President for financial, administrative, technical and logistical support."<sup>9</sup>

This dependency is compounded by a lack of impartiality. For example, a spokesperson for the Office of the President of Myanmar—the government body that created the ICOE—has stated that the ICOE's purpose is "to

1 Press Release, Independent Commission of Enquiry (Jan. 20, 2020) [hereinafter "ICOE"] <https://www.icoe-myanmar.org/icoe-pr-final-report>.

2 Press Release, ICOE, Government of the Republic of the Union of Myanmar Establishes the Independent Commission of Enquiry (Jul. 30, 2018).

3 See e.g. Myanmar's objections to the Council's Arria-formula meeting on "Mass Atrocity Crimes in Myanmar: Where do we stand on accountability?" stating that it "is addressing the issue of accountability by setting up the Independent Commission of Enquiry." Letter from the Permanent Mission of the Republic of the Republic of the Union of Myanmar to the United Nations, New York to the President of the Security Council (Aug. 22, 2019).

4 Human Rights Council, Report of the independent international fact-finding mission on Myanmar, para. 96, U.N. Doc. A/HRC/39/64, (Sept. 12, 2018) [hereinafter "FFM 2018 report"]

5 Press Release, Independent Commission of Enquiry (Jan. 20, 2020) <https://www.icoe-myanmar.org/icoe-pr-final-report>.

6 Aung San Suu Kyi, Give Myanmar time to deliver justice on war crimes, Financial Times, Jan. 23, 2020.

7 U.N. Economic and Social Council, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, U.N. Doc. E/CN.4/2005/102/Add.1, (Feb. 8, 2005).

8 Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, para. 1619, U.N. Doc. A/HRC/39/CRP.2, (Sept. 18, 2018) [hereinafter "FFM 2018 detailed report"].

9 Human Rights Council, Report of the independent international fact-finding mission on Myanmar, para. 99, U.N. Doc. A/HRC/42/50, (Aug. 8, 2019) [hereinafter "FFM 2019 report"].

response [sic] to false allegations made by the UN Agencies and other international communities.”<sup>10</sup> Further, the Myanmar FFM has noted that one of the Commissioners is the chief coordinator of Myanmar’s “Union Enterprise for the Humanitarian Assistance, Resettlement and Development in Rakhine,” which implements development projects in Rakhine state, including those which bulldoze over burned Rohingya villages.<sup>11</sup> In addition, prior to his position on the ICOE, this same Commissioner has denied that ethnic cleansing or genocide took place in Rakhine State.<sup>12</sup> One of the key conclusions in the ICOE report was that while war crimes and human rights violations may have occurred, genocide did not.<sup>13</sup>

The publicly available contents of the ICOE’s report do nothing to help allay these concerns as to its independence and impartiality; in fact, they raise new ones. This includes, the fact that the report’s Executive Summary closely mirrors the narrative and, in some sections, the language utilized by the Government of Myanmar and its counsel in defending itself at the ICJ in December 2019, over a month before the final report was submitted to the Government. For example, in its discussion of international courts, the ICOE stated that “[s]ound factual analysis, in pursuit of the truth, and due process should not be sacrificed to satisfy the *impatient* desire of some actors to externalize accountability processes.”<sup>14</sup> In a materially similar manner, Aung San Suu Kyi noted in her remarks to the ICJ that “a rush to *externalize* accountability may undermine professionals in domestic criminal justice agencies. What does the appearance of competition between domestic and international accountability actors do to the public’s trust in the intentions of *impatient* international actors.”<sup>15</sup>

The thematic, narrative, and analytic parallels between the State Counsellor’s comments and the ICOE’s Executive Summary on this point indicate the ICOE’s critical lack of independence. These parallels between the arguments presented by Myanmar’s government at the ICJ and the subsequent findings of the ICOE are compounded by reports that the head of the ICOE’s Secretariat was also a part of Myanmar’s delegation to the ICJ,<sup>16</sup> where she was designated as an “Advisor to the Alternate Agent.”<sup>17</sup>

## Methodology of the ICOE

To date, the ICOE has yet to provide a clear statement of its methodology. While the Executive Summary provided limited insight into the work done by the ICOE’s evidence collection and verification teams (“ECVT”), the information does little more than describe broad strokes of their work—namely the number and location of interviews. However, the Summary provides no information as to what sources and materials were included beyond individual interviews, the standard of proof employed by the Commission, nor how it corroborated and verified the first-hand information on which upon it relies heavily. Moreover the Executive Summary contains a section titled “Quality Control in Conflict-Related Fact-Finding,” which summarizes good practices the ICOE ostensibly subscribed to in its fact-finding work, but does not indicate that these measures were in fact followed. It should also be noted here that following a meeting with the Chair of the ICOE in March 2019, the Myanmar FFM concluded that the “information provided about the Commission’s...methodology raised serious concerns for the mission.”<sup>18</sup>

In addition, the ICOE did not interview Rohingya victims and witnesses in Cox’s Bazar in Bangladesh, where over 700,000 Rohingya Muslims and other minorities fled to and sought refuge from Rakhine State.<sup>19</sup> Rather, the publicly available sections of the report indicate the ICOE its based conclusions primarily on interviews conducted with civilians remaining in Rakhine State from a variety of ethnic backgrounds, including presumably Rohingya,<sup>20</sup> as

<sup>10</sup> U Zaw Htay, Spokesman of the Office of the President: the questions have been raised as to the reasons for the removal of the Facebook accounts and pages associated with Tatmadaw, Global New Light of Myanmar, Aug. 29, 2018, <https://www.globalnewlightofmyanmar.com/u-zaw-htay-spokesman-of-the-office-of-the-president-the-questions-have-been-raised-as-to-the-reasons-for-the-removal-of-the-facebook-accounts-and-pages-associated-with-tatmadaw/>.

<sup>11</sup> FFM 2018 detailed report, para. 1619.

<sup>12</sup> FFM 2018 detailed report, para. 1619.

<sup>13</sup> ICOE, Executive Summary at 9, (Jan. 20, 2020), <https://www.president-office.gov.mm/en/sites/default/files/BM.pdf>.

<sup>14</sup> ICOE Executive Summary at 11-12, (Jan. 20, 2020).

<sup>15</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), [2019] ICJ Verbatim Record 2019/19 at 18 (Dec. 11, 2019), <https://www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BI.pdf>.

<sup>16</sup> Andrew Nachemson and Lun Min Mang, ICOE Staffer embroiled in conflict of interest controversy, Frontier Myanmar, Jan. 29, 2020.

<sup>17</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), [2019] ICJ Verbatim Record 2019/19 at 8.

<sup>18</sup> FFM 2019 report, para. 100.

<sup>19</sup> ICOE, Executive Summary at 7.

<sup>20</sup> In line with the practice of Myanmar’s government, the ICOE does not use the term Rohingya, but rather Muslim. It is worth noting that not all Muslims in Myanmar identify as Rohingya.

well as military and police. The Myanmar FFM has noted that, at least with respect to one mission to Rakhine State in August 2018, interviews with victims were conducted in the presence of security officers, raising concerns of possible coercion.<sup>21</sup>

Finally, the ICOE explicitly notes in its Executive Summary that the Myanmar FFM’s findings were based almost entirely on statements by refugees in Cox’s Bazar (due to Myanmar’s repeated denial of access to Rakhine State to the Myanmar FFM), and that accordingly, “[t]he veracity of these potential witness statements must necessarily be scrutinized and evaluated, including through normal practices of due process and contradistinction. Such testing has yet to take place.”<sup>22</sup> Leaving aside the validity of this critique, there is no acknowledgement by the ICOE that its own work was limited in scope, nor that it followed the same standard it seeks to impose on the Myanmar FFM.

## Findings of the ICOE

While concerns over the ICOE’s methodology, independence, and impartiality on their own are sufficient to warrant cautious engagement with the ICOE, the narrative and conclusions contained in its Executive Summary—which are entirely at odds with those of the UN’s own experts and bodies, the US State Department, and numerous other non-governmental organizations—only serve to heighten this caution. Additionally, while the Executive Summary’s limited findings that war crimes and human rights abuses may have occurred represent a progression from previous such Commissions, they do not, without more, form the basis for the disengagement of the international community in justice and accountability processes in Myanmar.

For the purposes of this Factsheet, we focus on two illustrative examples: (1) the ICOE’s treatment of rape and sexual violence; and (2) the construction of the narrative of armed conflict.

### *Treatment of Rape and Sexual Violence*

The ICOE’s Executive Summary categorically dismisses allegations of rape and gang rape. The Summary states “[t]here were no credible statements on allegations of gang rape committed by Myanmar’s security forces. Although some interviewees mentioned rape cases, these were all second-hand information heard from someone else.”<sup>23</sup> This egregious conclusion flies in the face of findings to the contrary from, amongst others, the Myanmar FFM, who found rape and sexual violence to be a “hallmark” of Myanmar’s military operations in Rakhine State, as well as in other regions. Furthermore, in finding that “rape and other sexual violence have been a particularly egregious and recurrent feature of the targeting of the civilian population,” the Myanmar FFM made the decision to write a thematic report focused solely on crimes of sexual and gender-based violence.<sup>24</sup>

In addition, Myanmar’s military has been listed in the annexes of the annual reports of the Secretary-General on conflict-related sexual violence as a party “credibly suspected of committing or being responsible for patterns of rape or other forms of sexual violence in situations of armed conflict on the agenda of the Security Council.”<sup>25</sup> In Security Council Resolution 1960, the Council expressed its commitment to utilize this list of parties as the “basis for a more focused United Nations engagement with those parties, including as appropriate, measures in accordance with the procedures of the relevant sanctions committees.”<sup>26</sup> Acceptance of the ICOE’s Executive Summary clearly opposes this commitment, and sends a message to victims and survivors of sexual and gender-based violence that the international community will support accountability efforts that erase their experiences and deny them justice.

### *Construction of the Narrative of Armed Conflict*

The ICOE has taken care to build a narrative grounded in the existence of an internal armed conflict between the Arakan Rohingya Salvation Army (“ARSA”) and Myanmar’s security forces, which encompasses the entirety of the context for the so-called “clearance operations” in Rakhine State. It is this narrative which forms the baseline for

21 FFM 2019 report, para. 100

22 ICOE, Executive Summary at 9.

23 ICOE, Executive Summary at 6.

24 Human Rights Council, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, U.N. Doc. A/HRC/42/CRP.4, (Aug. 22, 2019) [hereinafter “FFM SGBV report”].

25 See e.g. U.N. Secretary-General, Report on Conflict-Related Sexual Violence, U.N. Doc. S/2019/280 (Mar. 29, 2019).

26 S.C. Res. 1960, U.N. Doc. S/Res/1960 (Dec. 16, 2010).

the limited violations—categorized as war crimes and human rights abuses—identified by the ICOE. Importantly, engagement with or praise of those conclusions may have the effect of validating the findings and analysis on which they are premised—many of which are flawed.

There is a clear divergence between the narrative conveyed in the ICOE’s Executive Summary and the reporting of the Myanmar FFM.

For example, their descriptions of the initial incidents of violence vary widely. The ICOE’s Executive Summary characterizes the initial attacks by ARSA in August 2017 as “deploying massive numbers on 30 police outposts and stations and one military battalion headquarters.”<sup>27</sup> The ICOE goes on to cite estimates from Myanmar’s Police Force, that the “total number of people who participated were over 9,000 thus being able to launch attacks on a much larger scale than in October 2016, and in a wider geographical area.”<sup>28</sup> In contrast, the Myanmar FFM found that “a small number of minimally-trained leaders had some arms, and a significant number of untrained villagers wielded sticks and knives. Some had improvised explosive devices. Twelve security personnel were killed.”<sup>29</sup>

Similar gaps can be found in the descriptions of the responses by Myanmar’s security forces. For example, the ICOE concluded that Myanmar’s security forces were vastly outnumbered by ARSA, that the uprising “shocked” the troops on the frontlines, who “did not know how to react to the massive numbers of ARSA-fighters and armed civilians.”<sup>30</sup> They further conclude that “[i]n responding to this national emergency, discretionary actions were taken in the field, in rapidly changing situations on the ground by soldiers and their immediate commanders deployed at the village level.”<sup>31</sup> Elsewhere the ICOE notes, dismissing the possibility of genocidal intent, that “the actions and reactions were triggered by individual fear, enmity, and historical grievances rather than by a plan, design or order. Myanmar’s security forces were caught by surprise and responded haphazardly to restore order in response to coordinated ARSA attacks.”<sup>32</sup>

This stands in sharp contrast to the conclusions of the Myanmar FFM, who found that “[t]he security forces’ response was immediate, within hours, brutal and grossly disproportionate,” that “the operations targeted and terrorised the entire Rohingya population,” and that “they continued for more than two months, and for a considerable period after the Government claimed their completion on 5 September 2017.”<sup>33</sup> In addition, contrary to the ICOE’s characterizations that the response was “haphazard” and devised by soldiers and commanders at the local level, the Myanmar FFM found that “despite the operations covering a broad geographic area, they were strikingly similar,” and that “the nature, scale and organization of the operations suggests a level of preplanning and design on the part of the Tatmadaw leadership consistent with the vision of the Commander-in-Chief.”<sup>34</sup>

Notably, even after having unprecedented access to Myanmar’s defense and security personnel, it appears that the ICOE relied on conjecture to underpin key aspects of its analysis. For example, in drawing its conclusion that Myanmar security forces were “seriously outnumbered” by ARSA fighters and others mobilized by them (which the Commission determined to number 14,000 seemingly based solely on the estimations of Myanmar’s police)<sup>35</sup> the ICOE used apparent presumptions based on estimates for the numbers of forces deployed.<sup>36</sup> It would not be unreasonable to assume that with its levels of access, the ICOE could have obtained far more precise deployment information from Myanmar’s government and military.

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27 ICOE, Executive Summary at 3.

28 ICOE, Executive Summary at 3.

29 FFM 2018 detailed report, para. 750.

30 ICOE, Executive Summary at 4.

31 ICOE, Executive Summary at 4.

32 ICOE, Executive Summary at 9.

33 FFM 2018 detailed report, para. 751.

34 FFM 2018 detailed report, para. 752.

35 ICOE, Executive Summary at 3.

36 The ICOE provides, in a footnote, a description of how it made its estimates: “According to the internal report of Myanmar’s Defense Services, 25 infantry battalions were deployed as main operation units. If we presume that around 150 officers and soldiers belong to each infantry battalion, 25 infantry battalions should technically amount to 3,750. Normally two companies, which consist of 80-100 soldiers, of one battalion are sent to the actual frontline. This can lead us to estimate the minimum manpower of those infantry battalions in the frontline of 2,000. But, this does not include other military units, police forces and logistical supports [sic]. Taking those lacking factors into consideration, ICOE assumes that the total number of soldiers deployed during the security operations ranges from 3,000 to 3,500 in the frontline while 1,000 to 1,500 were in support.” ICOE, Executive Summary at 14.

Finally, the temporal limitations the ICOE has placed on its investigation (August 25 - September 5, 2017)<sup>37</sup> also raise concerns over its analysis of armed conflict. For example, this time range precludes evidence and information supporting the military build-up in Rakhine State after the October 2016 “clearance operations,”<sup>38</sup> including the arrival of elements of the 33rd and 99th Light Infantry Divisions after August 10, 2017, weeks before the ARSA attacks that purportedly precipitated the 2017 “clearance operations.” Additionally, this time limit also precludes information subsequent to the Myanmar government’s stated end date of operations of September 5, 2017; importantly, the Myanmar FFM found that operations continued for two months afterward. As a result the temporal scope of the ICOE’s investigation removes important contextual information from its analysis of armed conflict.

Ultimately, this flawed construction of the internal armed conflict between ARSA and Myanmar’s security forces becomes a means for finding limited violations of war crimes and human rights, including the disproportionate use of force, killing, and acts of displacement (but not rape) by “some members” of Myanmar’s security forces. However, this same analysis is then also utilized to vindicate senior military leadership of responsibility, and to dismiss the possibility of genocidal intent. While the finding of potential war crimes and human rights abuses is a step in the right direction, it cannot mitigate the serious flaws in the analysis that leads to these conclusions, nor can it justify the vindication of responsibility.

## Conclusion

The Rohingya have clearly identified justice and accountability as a non-negotiable pre-condition for their safe and voluntary repatriation.<sup>39</sup> As one refugee in Cox’s Bazar who was approved for repatriation noted, “None of those criminals has been brought to justice so how can we feel safe to return to our homes?” Furthermore, while the ICOE has attempted to grapple with a limited picture of the crimes that occurred in Rakhine State, it fails to acknowledge or engage with the structural basis of the military’s actions against the Rohingya, thereby removing the operations from essential context.<sup>40</sup> Such context includes the pervasive culture of impunity that has allowed the military, for decades, pursue a modus operandi that has permitted the systematic targeting of civilians and sexual violence against ethnic minorities, amongst other serious violations.<sup>41</sup> Accordingly, at present, neither the ICOE nor the domestic processes upon which it relies to take its work forward, such as military court martials, present a legitimate pathway for justice and accountability.

While it is impossible to form a complete analysis of the ICOE’s work without the public release of the complete report, the information currently in the public domain, namely the report’s Executive Summary, raises serious concerns that should inform a careful and cautious approach by the international community to the ICOE and its work. The bare findings of potential war crimes and human rights violations by low-level military perpetrators may, on their face, represent progress from previous such Commissions; however, it does not warrant the legitimization of limited and flawed narrative that underpins these findings. These are compounded by the Commission’s lack of independence from Myanmar’s government, the conflicts of interest and lack of impartiality of its Commissioners and staff, as well as a methodology that is opaque at best.

Since the ICOE was created, Myanmar has used it as a tool to deflect and defer attempts by the international community to ensure justice and accountability for its genocidal campaign against the Rohingya. It is essential that the ICOE’s final report is used not to submit to Myanmar’s entreaties to defer to domestic accountability processes, but rather to call for Myanmar to clearly and transparently address these flaws and commit to a truly independent investigation of and accountability for the occurrences in Rakhine State.

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37 ICOE, Executive Summary at 12.

38 FFM 2018 detailed report, para. 1096-1100.

39 Hannah Ellis-Petersen and Shaikh Azizur Rahman, Rohingya refugees turn down second Myanmar repatriation effort, *The Guardian*, Aug. 22, 2019, <https://www.theguardian.com/world/2019/aug/22/rohingya-refugees-turn-down-second-myanmar-repatriation-effort>.

40 See e.g. Global Justice Center, Fact Sheet: Structural Barriers to Accountability for Human Rights Abuses in Burma, Oct. 2018, <http://www.globaljusticecenter.net/files/Structural-Barriers---Burma.pdf>.

41 Hannah Ellis-Petersen and Shaikh Azizur Rahman, Rohingya refugees turn down second Myanmar repatriation effort, *The Guardian*, Aug. 22, 2019, <https://www.theguardian.com/world/2019/aug/22/rohingya-refugees-turn-down-second-myanmar-repatriation-effort>.